No. 13802

In the United States Court of Appeals For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF INTERVENORS JOSEPH A. PEPIN AND PETER PIOLI

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BRIEF OF INTERVENORS

I. JURISDICTIONAL STATEMENT

This case is before this court upon the petition of Boeing Airplane Company, and is based upon grounds set forth in the opening brief of the petitioner Boeing Airplane Company, pages 1 to 3, which, by reference thereto, we hereby adopt. The propriety of a joint petition on behalf of these intervenor parties adequately appears from the fact that they are aggrieved by the order of the National Labor Relations Board issued March 26, 1953, which Order and Decision is to be found set forth in full in transcript of record, page 269 *et seq.* In its Order and Decision, the Board held Boeing Airplane Company guilty of certain violations of sections 8 (a) (1), (2), (3), and (4) of the Act, and ordered and directed Boeing to reinstate some 8 former employees and to make them whole for loss of pay during the period of their unemployment intervening since their discharge. These petitioning intervenors were included

within the group of employees of the Boeing Airplane Company in the proceedings before the National Labor Relations Board below, and they appeared personally at the trial conducted on and following January 3, 1952, before Trial Examiner Wallace E. Royster and testified therein. The finding of the Trial Examiner rejecting their petitions for reinstatement was affirmed and adopted by the Board, and as a result thereof these intervenors become and are parties aggrieved under the Act, section 10 (f) and by reason thereof this court has jurisdiction to review the Board's order denying them reinstatement and recovery for back pay. This review is governed by the said section of the Act and by the Administrative Procedure Act (5 U.S.C. §1001 *et seq.*).

II. STATEMENT OF FACTS

Without accepting argumentative allegations or conclusions contained therein, we do however make reference to the statement of facts in the brief of petitioner Boeing Airplane Company, pages 3 to 11, and therefore do not further here notice the general factual background of this controversy. The particular facts affecting the status of these intervening parties will be more specifically considered in our discussion under the topic "Argument," *infra* p.

III. QUESTIONS INVOLVED

1. Whether the evidence supports the finding that the complaint as to intervenors Pepin and Pioli be dismissed.

2. Whether the Trial Examiner, in determining the testimony of supervisor Morrell unworthy of belief in

one situation, is justified in accepting his testimony as the sole basis for denying relief to Pepin in another situation.

3. Whether the Trial Examiner's conclusion, adopted by the Board, can logically and legally be based on his findings of fact.

IV. SPECIFICATIONS OF ERROR

The Board erred:

1. In holding that the termination of Pepin and Pioli was lawful. (Pepin R. 163; 217; Pioli R. 69-71; R. 199.)

2. In refusing to order Boeing to reinstate and make Pepin and Pioli whole for loss of pay.

3. That as to intervenors Pepin and Pioli, the Order and Decision of the Board denying them relief is arbitrary and capricious, and is not supported by substantial evidence considered upon the record as a whole.

V. ARGUMENT

1. Joseph A. Pepin

The Trial Examiner, in his report and recommendations, held that the Company was warranted in discharging a considerable number of its employees. The Board affirmed the Trial Examiner in his findings with the exception of 3 employees whom it held had been illegally discharged, and whose reinstatement the Board ordered. Among these 3 was one Arthur C. Gerber. The Trial Examiner sought to sustain the Company in discharging Gerber upon the basis and the weight accorded by him to the testimony of the Company's witness, a supervisor Lynn Morrell. The Board, however, ex-

plicitly overruled the Trial Examiner in this finding and found the witness Morrell as non-creditworthy and "not entitled to credence":

> "The foregoing facts convince us, and we find, that Morrell was not responsible for Gerber's discharge. We base this finding on the fact that although at the hearing Morrell alone took responsibility for initiating the discharge, his testimony concerning the circumstances of the discharge, as found hereinbefore, *is not entitled to credence* * * * " (R. 275-277) (Italics ours.)

Was not Morrell equally as unworthy of credit in Pepin's case as he was in Gerber's? Can the Board make "fish of one and fowl of the other?" Pepin's status stood exactly upon the same ground as Gerber's. Did not and does not the record preponderate, as it does in Gerber's case, against supervisor Morrell's credibility? Pepin was a time-keeper and the witness Morrell was his supervisor. Pepin testified without contradiction that there had been no criticism of his services as a time-keeper following the strike (R. 1781-1793). The only testimony offered against Pepin was that of the witness Morrell. Morrell's vague testimony (summarized by the Trial Examiner (R. 163-165), containing complaints against Pepin, most of them occurring prior to the strike and therefore irrelevant to the controversy here, was contradicted by Pepin and unsupported by any other witness. Up to the moment of his discharge, Pepin was given no intimation that his services were unsatisfactory. In fact, he was praised, for Lynn Morrell stated: " * * * as a reward for my demeanor, that he would give me back my third shift, which he knew I

preferred" (R. 1784-1788). Pepin's version of the discharge was corroborated by witnesses Powell (R. 3491), Miller (R. 4373), Meredith (R. 4375), and Sullivan (R. 4396). Obviously, therefore, Morrell's testimony stood alone. Yet, though thoroughly discredited by the Examiner in his testimony with reference to Gerber, both the Examiner and the Board relied upon him, to the exclusion of the preponderance of the testimony against him, to support Pepin's discharge.

Morrell is impeached by the uncontradicted evidence of the company itself. At the time of his discharge, the company delivered to him a termination slip. That slip was not based upon any of the complaints, *ex post facto* set up by Morrell in his testimony. On its face it negatives those complaints for it shows that the reason for his termination was *"Laid off for lack of work"* (Ex. 159, 8. 1780, 1784, 1785).

That there was anti-union animus against Pepin is evident from the record. Note testimony of Kelly De Priest, formerly an official in the union but at the time of the discharge herein an organizer for the Teamsters. He taunted Pepin with the prediction that within a short time Pepin, who openly wore the union's button on his lapel, would be let out. Then, too, at the time of his discharge, on the ground of lack of work, it is apparent that the company retained all other timekeepers—even those hired after Pepin was employed (R. 1786-1787).

Another fact that appears equally without contradiction is that Morrell strictly enjoined upon Pepin an obligation not to engage in any union activity on the

company premises, but allowed another timekeeper, an officer in the rival Teamsters' union, to promote membership in the latter union very extensively on company time (R. 1791, 1794).

Let us add another significant factor: Despite the elaborate system of personnel records maintained so extensively by the company, neither the company nor Morrell produced any evidence whatsoever from the personnel files in Pepin's case. This is true although he worked for the company over eight years. Yet, in the case of other employees and other timekeepers throughout the record, personnel records offered in evidence were extensive and profuse.

Another inconsistency which impeaches the value of Morrell's testimony is the fact that the complaints as to which he testified were largely prior to the strike; yet we find Morrell quite willing to rehire Pepin after the strike and retain him for a period of a year thereafter. Clearly, then, the reasons given in Morrell's testimony were not his real reasons; they were nothing but his own self-serving afterthought or his attempt to rationalize the obvious inconsistency in his position. After all, Pepin's discharge—which Morrell seeks to place upon the basis of these complaints, largely prior to the strike —was timed not in connection with such complaints but rather with relation to the spirited, bitterly contested representation campaign waged in the plant after the strike. The discharge significantly was just prior to the election, at a time when he was well known for his opposition to the Teamsters' abhortive organizational campaign. Pepin was a marked man and was branded

as a partisan of Lodge 751 and an opponent of the Teamsters.

A more particular reference to record testimony may be helpful.

Pepin testified that Emery Schell, his immediate supervisor, handed him his termination slip (R. 1784). The slip indicated that Pepin was "Laid Off" due to "Reduction in working force" (R. 1784) (G. C. Ex. 159). Schell stated, when he presented the slip to Pepin, that he had no prior knowledge of it and did not believe that Morrell knew anything about it previous to that date (R. 1784), Schell was not called as a witness. At the time of Pepin's layoff, the respondent retained timekeepers hired after him (R. 1787). Pepin also testified, without contradiction, that there had been no criticism of his work as timekeeper following the strike (R. 1787-8). According to Pepin, approximately one month before his layoff, Kelly DePriest, still on leave as a Teamster organizer, offered to bet Pepin that Pepin would not be with the respondent in six weeks (R. 1787-8).

Morrell was the only witness called by the Respondent to testify concerning the discharge of Pepin. Morrell's testimony in Pepin's case is so revealing of the character of the man as a witness that it is reproduced in some detail.

On direct examination, without first ascertaining whether Morrell had any responsibility for Pepin's layoff, counsel for the respondent asked Morrell whether he ever criticized Pepin. Morrell then related the fol-

lowing four incidents, each of them too remote to prove a moving factor in his discharge.

(1) "Well, one time he was caught playing poker down in the tunnel with some other employees.

Q. This was during working hours?

A. Yes, I think it was right after, *overstaying his lunch period* it was, I believe."

(2) "And then he was one time caught going through the Company's mail—caught by a guard, caught in the mail room.

Q. What do you mean, going through the Company's mail room?

A. Well, in the mail room—he was discovered in our mail room, looking through different envelopes and so on, to see what he could see, in the mail room.

Q. Those were sealed envelopes, you mean?

A. Oh, yes; they were sealed and unsealed * * *."

(3) "Yes, he was caught a couple of times, leaving his work area early."

(4) "And I know one thing in particular, that I allow timekeepers to come in early to watch the clock—in other words, to watch the new hires or the employees that come to work in the morning, to help new employees, to help them find their clock cards, and so on. And we pay them one-tenth early; and the one-tenth is six minutes; and our union agreement called for a person working for four minutes of a tenth was to receive pay for the full tenth. So then I noticed in checking Mr. Pepin's clock card *that he was always just two minutes into the tenth; in other words, he would just work four minutes of the tenth instead of the full six minutes.* And I had

> to send a letter out to the effect that unless they spent the full six minutes at the clock, they wouldn't get paid for the full tenth. So he brought up the question that all you have to work is four minutes; and that is all I am going to do—in other words, not going into the spirit of the order of the overtime in working a full six minutes; so I took him off of overtime entirely." (R. 2704-6)

The overtime incident, since it involved Lodge 751's contract, manifestly took place before the strike (R. 2706). Pepin was laid off before any contract was executed after the strike. Morrell also testified that Pepin would not work overtime except at his own convenience (R. 2706). This was a general accusation, unlimited in time, but preceded the strike, since as noted, just above, Morrell took Pepin off overtime entirely before the strike. Morrell conceded that under the contract which was in effect before the strike, overtime was not compulsory (R. 2711).

Morrell took credit for the layoff of Pepin (R. 2708). We are left to infer that the four incidents detailed above were the reasons. But, on cross-examination, significantly enough, it developed that *all the above-enumerated criticisms took place sometime before the strike* (R. 2708-9, R. 2710-11), the poker incident being three years before the strike (R. 2709-10).

Pepin was recalled to the stand on rebuttal to present his side of the charges which Morrell had made against him. Pepin's testimony, and that of several witnesses called in corroboration, clearly demonstrated that Morrell *had deliberately sought to distort the facts as to each incident*:

(1) The poker incident which occurred 3 years before the strike (R. 2710)

Pepin admitted that he and some machinists were turned in by a guard for playing poker (R. 4083-4). It was not, however, during work hours, and he did not over-stay his lunch period as Morrell indicated (R. 4084, l. 22, to R. 5531, l. 22). He testified further that Morrell sent him a warning for playing poker against company rules (R. 4084-5). Two of the machinists charged with Pepin were called and corroborated Pepin's story as to the incident, including his statement that they did not overstay the lunch period (R. 4373-5).

(2) The mail incident which occurred 3 years before the strike (R. 4085)

Pepin admitted he was in the mail room, which was "almost directly across and a few feet down from" his office (R. 4085). He testified that in his work he used the room to sharpen his pencils (R. 4085). On the day in question, a guard came in as Pepin picked up a briefcase lying in a lost and found basket, and turned him in (R. 4085). Pepin denied that he was "looking through different envelopes" as Morrell had stated or that he was looking through envelopes that were "sealed and unsealed" (R. 4086), or that he was going through any mail (R. 4033, ll. 1-2). He stated, without any contradiction in the record, that there was *no mail* in the mail room when he was turned in (R. 4086).

Pepin related further than ten days after the incident, Morrell suspended him; he was given a hearing (R. 4086-7) before a grievance board (R. 4087). Mor-

rell and the guard were present. At that hearing, only the guard gave direct testimony on the incident.[1] (R. 4087). The guard testified only that he saw Pepin pick up the briefcase, look at it, and lay it down (R. 4088). He testified that Pepin did not open it. There was no mention of mail at the hearing (R. 4088). Pepin testified then, that upon motion of a company representative, he was given a two weeks' suspension "for being in the mail room" (R. 4088).

Dick Powell, Machinists' Grand Lodge Representative, testified that he represented Pepin at the hearing on the mail incident (R. 4391). The only eyewitness was the guard who testified that he found Pepin in the mail room examining some type of mail pouch and stated he did not observe Pepin going through any mail (R. 4392-3).

Lawrence Sullivan, who was one of the two union representatives (R. 4396), testified that the guard was the only eyewitness (R. 4397) and that after cross-examination his story was that Pepin had a mail envelope in his hand (R. 4398-9, l. 25) which he described as "a pouch or envelope similar to that brown one there lying on the table" (R. 4401).

(3) Leaving work area early which occurred before the strike (R. 4089)

Pepin testified that he was reported *only once* for leaving his work area early (R. 4089). He left then on company business just before lunch time to find an employee's clock card (R. 4089). He was suspended 25

[1] The guard was not called in the hearing in the instant case.

hours by Morrell for leaving his work area early to eat (R. 4090). After the suspension, Morrell recognized he had been in error and Pepin was paid for his time off (R. 4090) and this even Morrell does not contradict.

(4) The one-tenth deal

Should the one-tenth deal be of any consequence —and we doubt it, Pepin's description of it is to be found at R. 4091. On this incident, Pepin testified that Lodge 751's contract called for overtime payment for the full extra six minutes provided the employees were there at least an extra four minutes (R. 4091). When Morrell, contrary to the terms of the contract, insisted that the timekeepers work a full six minutes before they would be paid any overtime, Pepin, *as shop committeeman,* received complaints and took steps to enforce the contract (R. 5539, to R. 5540). He contacted Assistant Labor Relations Manager Huleen and told him he would have to file a grievance if Morrell did not live up to the contract. Huleen then told Morrell to abide by the contract (R. 4093).

Pepin denied that he made a practice of punching in two minutes late at claimed by Morrell (R. 4093) and testified—and no counter evidence was offered—that his clock cards would show that, in the vast majority of the time, he worked the full extra six minutes (R. 4093). He denied further that Morrell sent out any letter on working the full six minutes (R. 5542, ll. 5-11). He also denied Morrell's testimony that he told Morrell he was only going to work four minutes (R. 4093). Pepin agreed he was taken off overtime, but testified that his immediate supervisor told him it was punishment for forcing these grievances to an issue (R. 4094).

This antedated the strike, subsequent to which Pepin was rehired, thus removing the so-called overtime dispute arising earlier, as a ground for discharge on the eve of the election.

Pepin denied working overtime only at his convenience as Morrell claimed and stated that he was second or third highest in overtime out of 300 timekeepers throughout the war period when overtime was plentiful (R. 4094-5). The General Counsel then asked the respondent to produce Pepin's clock or time cards. Pepin examined his cards "To check on whether (he) worked overtime, and to check whether (he) consistently punched in two minutes late, as testified to by Mr. Morrell" (R. 4378-9), that is "punched in two minutes less than the required six minutes" (R. 4379). He reported that these cards showed as follows *re* overtime (R. 4380-83):

1942—not one day's work without overtime
1943—not one day's work without overtime
1944—worked overtime 300 out of 304 days
1945—worked overtime 200 out of 218 days
1946-1948—worked overtime 53 out of 444 total days

On the one-tenth deal, the cards showed that the system was started on November 7, 1947; and that Pepin was taken off the one-tenth deal after 44 working days (R. 4381). On only five out of the forty-four days did he punch in less than a full six minutes early and receive overtime pay; on twenty-one days he punched in six or more minutes early (R. 4382-4). On the remaining eighteen days he was at work on time but less than four minutes early so that he did not qualify for overtime

under Lodge 751's contract. Morrell, on recall conceded that timekeepers did not have to report in six minutes early if they did not wish (R. 4444).

The above figures from Pepin's time cards clearly support Pepin's testimony and refute Morrell's as to overtime worked by Pepin. In any event Pepin ceased working overtime long before the strike (R. 4381).

The General Counsel asked the respondent to produce any *warnings or memoranda in Pepin's file concerning the various incidents to which Morrell testified.* Counsel for the respondent reported that, after an examination of the file, they found nothing but the arbitrator's decision suspending Pepin *"for two weeks for being in the mail room"* (R. 4377-8). Thus, Morrell's testimony stands wholly unsupported in the record, and, incidentally, the only memo in the file, supports Pepin's testimony as to why he was suspended. It was "for being in the mail room," not for going through mail as intimated by Morrell's testimony (R. 4377-8).

In summary, Morrell was completely discredited as a witness in Pepin's case. Since his testimony had every appearance of being deliberately fabricated, it is submitted that his entire testimony in the hearing as to Pepin should be ignored as completely worthless. "False as to Gerber, false as to Pepin" and definitely proven to be so by the record itself.

The respondent failed to offer any valid reasons why an active union man such as Pepin, who had had no criticisms on his work since the strike, was selected out of seniority for layoff. Reasons were offered which antedated the strike, by some years, and were shown to

be either entirely false or completely distorted. The conclusion is inescapable that the respondent chose Pepin for layoff because of his past performances as an active Lodge 751 committeeman. The choice was made at a time when the respondent knew that Pepin was interested in behalf of Lodge 751, with whom the company had gone through a bitter strike, in an election between it and the Teamsters, whom the company had permitted to engage in a rival organizational compaign.

We submit that on the entire evidence there is a complete absence of any showing that Pepin was discharged for any reason save his participation in concerted union activity. Each of the four reasons assigned by Morrell for his discharge are, by the overwhelming weight of the evidence, established not to have existed in fact. "Distorted" and "discredited" and "improbable" are words best suited to describe "a fair estimate of the worth" of Morrell's testimony.

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a board decision when it can not conscientiously find the evidence supporting that decision is substantial when viewed in the light the record in its entirety furnishes, including the body of evidence opposed to the board's view.[2]
>
> "The board's findings are entitled to respect; but they must nonetheless be set aside when the record before a court of appeals clearly precludes the board's decision from being justified by a fair

[2] *Universal Camera Corp.*, 1 N.L.R.B., 340 U.S. 474, 95 L.ed. 456.

estimate of the worth of the testimony of witnesses * * *.'"[3]

The Trial Examiner discredited Morrell in the Gerber case.

Each of the four reasons assigned by Morrell as motivating Pepin's discharge, we submit, when viewed in the light of the record in its entirety, did not exist in fact. The same reason exists to discredit his testimony in Pepin's case. Pepin's discharge was palpably wrongful and he should be restored to his rightful employment status.

2. Peter P. Pioli

The Trial Examiner, in his Intermediate Report and Recommended Order, held that the complaint as to Pioli should be dismissed (R. 19). The Board adopted the findings and conclusions of the Examiner and dismissed Pioli's claim (R. 269 to 288).

The Trial Examiner had before him the witnesses concerning Pioli's claim and Pioli himself. The Examiner had the opportunity of observing the witnesses, their demeanor, apparent honesty and truthfulness, and based on this hearing made certain conclusions of fact. These conclusions as to which witness he believed or disbelieved are nowhere challenged in the record, and we do not challenge them, in fact they are obviously correct. We do challenge, however, his conclusions of law and decision as to Pioli's case. The decision is patently wrong.

The testimony concerning Pioli was given by two

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[3] *Ibid, supra,* 340 U.S. 474, 95 L.ed. 456.

individuals, Pioli, himself, and Roger Hyman, an assistant superintendent of Boeings. The Examiner, in regard to Pioli's case and discharge, credited Pioli's account and did not believe Hyman (R. 71).

Therefore, let us examine the record in this light. Pioli was employed by Boeing, first, way back in 1938 as a tool and die worker and worked continuously up to the time of his discharge except for two periods, the first in 1945, when the entire plant was shut down, and, second, in 1948, during the strike (R. 69, 499, 500). It is stipulated that he was a "premium" worker (R. 499). No fault was ever found with his work; he was a capable workman (R. 71).

Pioli was one of the most prominent members of Lodge 751 (R. 70). Pioli was a district councilman in 1942, district vice president in 1943, district councilman in 1944, five terms as president of Local Lodge C, and many years as shop committeeman, during the strike in charge of all of Lodge 751's picket lines (R. 501).

The incident which preceded Pioli's discharge is related by Pioli (R. 504, 505, 506). This is the account which the Trial Examiner believes (R. 71) Pioli stated:

> "Q. I see. Well, now, how did that incident come about?
>
> A. I was given a die to check to see why the material which had been purchased for the die would not fit properly, and after examination I found that the die was of a 90-degree angle, and the material was an open angle; and the material, naturally, being an open angle, would not go into the slot easily, and I became suspicious that perhaps the ma-

terials that had been used down in Shop No. 102, which is the press department, was faulty, and was the same material; and naturally it would be faulty.

So I consulted my squad leader, Mr. Jim Anderson, or Eiler Anderson, and he referred to my assistant supervisor, Mr. Donald Jensen, and Mr. Jensen wrote out a permit so that I could go down to Shop 102 and check the material.

Upon arriving down there, Mr. Anderson was already there, and he and I checked the material, and found that the material that was being used was of an open angle, and thereby we found what was wrong.

He and I walked back up together. And in the meantime I had sent down a press plate to be sheared, and there was no open press available for the shearing process, so that I asked the press man to notify me when there was a press available, and I had no sooner gotten back up there at 702 when Mr. ..... back up there to 702 with Mr. Anderson, when I was called on the phone and informed that there was a press open in Shop 102.

Mr. Jensen informed me to use the same pass and to go down and to put my press plate on the press; and I went down, and Mr. Harry Hutton helped me put the press plate on the press. And about that time the whistle blew for lunch hour, and he and I came back up together to Shop 702.

Q. Now, Mr. Hutton, who is he?

A. He is the try-out man.

Q. I see.

A. The die try-out man.

Q. All right, then; you came back to 102?

A. Yes, sir.

Q. I see.

A. I came back to 702 rather.

Mr. Anderson, I went over to my bench, and Mr. Anderson informed me that Mr. Hyman was having quite a steam pressure, and that he was accusing me of having gone down into 102 for the purpose of organizing.

Mr. Hyman about that time came into the shop office, and I walked up to him and I showed him my pass, and I informed him that I was down there on legitimate business, and that Mr. (358) Anderson was down there with me, and he was very arbitrary.

Q. What did he say?

A. You want to know what he said?

Q. Yes.

A. He said, 'God damn you, Pioli, you know god damned well you were down there in 102 organizing,' and I said, 'Hyman, you are a damned liar,' and 'that is something you are going to have to prove.'

He said, 'I don't have to prove anything.' He said, 'Right now they will take my word for it, and you are as good as out.'

Q. Did that end the conversation with Hyman, then?

A. I walked away from him, because after all, when certain things occur I am not a very peaceful man myself. I walked away from him, and I went over and attempted to eat lunch. It choked me so I quit eating lunch and Mr. Delaney came in, and I spoke to Mr. Delaney. And Mr. Delaney—(359)."

Hyman gives his account of the incident as follows:

"A. Yes, Jim Anderson is a squad leader; and then he came back to the office, storming up there, and asked me what right or reason did I have to be checking up on him. He said, 'I had the right to be there.' I told him that I did, too, and that I was merely in performance of my duty, and then he said, 'I had the right to be down in 102, and what right did you have to be checking up on me?' And I said I had the right to check up on anybody in the shop as long as Mr. Delaney had asked me to take it over. And I said, 'Further, for your information, I just came to the shop and was here about ten minutes when I got a telephone call that you were down with a group of people in 102, waving your arms, trying to organize apparently.' And he said, 'You are a god damn liar.'

Q. What did you do then?

A. I said, 'Pete, would you mind repeating that,' because I wanted to be sure that the statement he made was that I was a 'god damn liar.' And at that time I told him, 'Well, Pete, so far as I am concerned, you are through working for the Boeing Airplane Company.'

Q. What action did the board take?

A. Upon my recommendation, they terminated him." (R. 3359, 3360, 3361)

The Trial Examiner does not believe Hyman's version (R. 71). The Examiner found that Hyman was prone to use vulgar and profane language when angry (R. 71).

Based on the record, there is only one reason why Pioli was discharged by Hyman, such discharge being

concurred in by Boeing, and that is found in Pioli's statement "He (Hyman) said, 'God damn you, Pioli, you know god damned well you were down there in 102 organizing' and I said, 'Hyman, you are a damned liar,' and 'that is something you are going to have to prove.' He said, 'I don't have to prove anything.' He said, 'Right now they will take my word for it, and you are as good as out' " (R. 506). The above is the version the Trial Examiner believed.

Here we have a situation in which one of the most prominent and well known union officials is discharged because he is falsely accused of organizing on the job. The swearing incident is patently not the reason, for Hyman, himself, states

> " * * * And so far as that shop or any shop is concerned, I believe that swearing is usual, but not particularly unusual." (R. 3362)

Pioli had high seniority on his job, being employed first in 1938. The reason given for his discharge is merely a guise. Hyman had this prominent union official, with high seniority and record of capable workmanship, discharged because of alleged unfounded concerted activity. Pioli was clearly discriminated against because of his union connections.

The Trial Examiner made a finding of fact as to what account of the incident was true in these words: "I credit Pioli's version of the incident" (R. 71).

As held by the Supreme Court in *Universal Camera Corporation v. National L. R. Bd.,* 340 U.S. 474, 95 L.ed. 456, 472:

> "The findings of the examiner are to be considered along with the consistency and inherent prob-

> ability of testimony. The significance of his report, of course, depends on the importance of credibility in the particular case."

In this case, the Trial Examiner credited Pioli's version of the facts. It is too clear for argument that the reason assigned for discharge of an employee of 12 years' standing has no foundation in the evidence in this case. It can only be naturally explained under the evidence as being grounded upon his active union connections and activity.

CONCLUSION

On the record before this court a "fair estimate of the testimony" regarding Pepin and Pioli, clearly demonstrates that the proximate cause of Pepin's lay-off and Pioli's discharge was not for the reasons assigned by management. These reasons, aside from their bearing the badge of remotness in time, and improbability in reason, were clearly demonstrated by the evidence to be without foundation in fact. A conscientious appraisal of the evidence can but lead to one conclusion: The proximate cause and motive behind the company's action in both cases was to weed from its ranks these two union employees, who exercised their right of engaging in concerted union activity—a right guaranteed them by the Taft-Hartley Act. Both should be reinstated to their positions at which they worked successfully and without complaint for nearly a decade.

Respectfully submitted,

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